

# THE FUNDAMENTAL RIGHT TO PROPERTY: A BRIEF REVIEW IN THE LIGHT OF RECENT DEVELOPMENTS

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In theory and on the basis of current specific legislation there are two main statutes which may, and have actually infringed upon the right to protection from deprivation of property without compensation (Article 37 of the Constitution) and to protection from privacy of home and other property (Article 38 of the Constitution). These are the Land Acquisition (Public Purposes) Ordinance and the Housing Act (Chapters 88 and 125 respectively of the Laws of Malta), the latter as amended by Act XXXVII of 1989.

The limitations to the above-mentioned rights are specifically established by the relative provisos contained in the respective Articles of the Constitution. This does not create any particular difficulty as it is based on the generally accepted principle enunciated by John Stuart Mill: the liberty of the individual must be thus limited: he must not make himself a nuisance to other people.

## **Section 47(9) of the Constitution**

However, section 47(9) of the Constitution gives rise to a number of problems in its interpretation and application in so far as it directs that the fundamental right to protection from deprivation of property without compensation may be legally infringed upon with the operation of any law in force immediately before 3rd March 1962, or any law made on or after that date that amends or replaces any law in force immediately before that date (or such a law as from time to time amended or replaced in the manner described in that sub-section), provided that such amendment or substitution does not incur any of the prohibitions expressly laid down by paragraphs (a) (b) (c) and (d) of section 47(9).

On a cursory look at the said section 47(9) one would be correctly tempted to conclude that both the Land Acquisition Ordinance, being an enactment of 1935, and the Housing Act, being enacted in 1949, are safeguarded from any allegation of a violation of section 37 in terms of section 47(9) itself. Even the above-mentioned 1989 substantial amendments to the Housing Act are safeguarded from any possible violation of section 37 as these, rather than adding to the kinds of property that may be taken possession of or the rights over and interests in property that may be acquired, have limited the kinds of property

subject to such possession or acquisition, have not made the conditions governing entitlement to compensation or the amount thereof less favourable to any person owing or interested in the property, and have not deprived any person claiming such compensation a right of access to an independent and impartial court or tribunal established by law for the purpose of determining his interest in or right over the property and the amount of any compensation to which he may be entitled, and for the purpose of obtaining payment of that compensation, and securing to any party to proceedings in that court or tribunal relating to such a claim a right of appeal from its determination to the Court of Appeal in Malta.

Yet, in reality, what particular legislation, if at all, did the legislator had in mind when drafting the limitation referred to in section 47(9)? Or was it meant to be a simple general blanket provision? This point, perhaps, may today be more of an academic than of a practical value in view of the current amendment being debated in Parliament aiming to make all legislation subject to chapter IV of the Constitution, and in view of Act XIV of 1987 which again renders all Maltese legislation subject to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Be that as it may, the point was taken to Court in a case recently decided by the First Hall of the Civil Court in its Constitutional jurisdiction. (Architect Edwin Delia et vs Housing Secretary, 14 / 6 / 1991, as per Mr Justice Caruana Colombo, now pending in the Constitutional Court). Mr Delia alleged that the limitation laid down by section 47(9) applied only with reference to the Land Acquisition (Public Purposes) Ordinance, and that the Housing Act did not come within the scope thereof. He contended that even the legislative text was indicative of his allegation. Although the Court did not directly dispose of the issue raised as it found that it need not enquire whether respondent's demand to applicant to afford recognition to the tenant allocated subject premises pursuant to the relative Requisition Order in terms of section 8 of the Housing Act violated section 37 of the Constitution, once the requisites of the latter section were not satisfied in fact, it nevertheless seemed inclined to accept respondent's argument that had the legislator wanted to limit the scope of section 47(9) only to the Land Acquisition (Public Purposes) Ordinance he would have expressly stated so. *ubi lex voluit dixit*. Perhaps the issue might crop up again for deliberation in the Constitutional Court!

### **The European Convention**

As has already been said, Act XIV of 1987 has rendered all Maltese legislation subject to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Thus, to a limited extent, the right to protection from privacy of home, enshrined by section 38 of the Constitution, is once more found in Article 8 of the European Convention, which lays down one's right to one's private and family life, home and correspondence, whereas the right to the protection from deprivation of property without compensation

is broadly found in Article 1 of the First Protocol to the Convention, which ensures that every natural or legal person is entitled to the peaceful enjoyment of his possessions. Some worthwhile considerations are called for in this regard.

Section 38 of the Constitution affords protection to a right partaking of both of a personal (i.e. privacy of home) as well as of a real (i.e. property) nature. The right protected by Article 8 of the Convention definitely partakes of an exclusively personal nature, as one's private and family life, home and correspondence cannot but be classified as thus. Undoubtedly, there is a discernible overlapping between the concept of property as found in sections 37 and 38 of the Constitution. What is the difference between the two and how are the terms "No person shall be subjected to the search ..... of his property or the entry by others on his premises" to be properly construed? What is the difference between 'property' and 'premises' as found in section 38? Is the definition of 'premises' to be limited only to residential premises, or must one rely on the general and unlimited definition as used in popular English language such that any house or land is covered?

That issue had also been raised in the case *Architect Delia vs Housing Secretary*, referred to earlier on. The Court was left in no doubt that, within the purview of section 38 taken as a whole, and which affords greater protection to the personal rather than the real aspect of the right in question, 'premises' could only be taken to mean residential premises, i.e. it is a pre-requisite for the purposes of that section that one must be in immediate and physical possession of one's property and premises. Again, this deliberation is pending on appeal in the Constitutional Court.

Basing oneself on this position so far enunciated by the Maltese Court with regard thereto, the issue might become problematic and further complicated in the context of the European Convention. At a first glance, it would seem that the equivalent of the local protection to one's right not to be subjected to the search of his property or the entry by others on his premises (as interpreted by the Maltese Court referred to above) lies in Article 8 of the Convention in so far as the right to one's home would also require the immediate and physical possession of 'premises'. Yet there is more to it than meets the eye.

Article 1 of the First Protocol to the Convention is so worded that it would appear to incorporate more than just the counter-part to the local right to the protection from deprivation of property without compensation. Indeed, it does not directly mention the right to compensation as I shall presently outline. Nor, for that matter, does it adopt the word 'property'.

The said Article 1 starts off by establishing the right to the peaceful enjoyment of one's possessions. This might easily entail that no person may be subjected to the search of his property or the entry by others on his premises. It also appears to entail that no property of any description may be compulsorily taken possession of. What is one to understand by "possessions"?

## Interpretation of “possessions”

Movables and immovables as well as corporeal and incorporeal possessions definitely fall within this right and are afforded protection. Obviously, possession has to be legitimate as otherwise no such protection may be invoked. Yet can there be one kind of possession, which, though legitimate for all intents and purposes of ordinary law, may not necessarily have the above-mentioned protection extended thereto? Does the European Convention afford protection to the right to the peaceful enjoyment of possessions held by a real title as opposed to possession held only by a personal title, or both? What if, for example, one temporarily possesses property by title of lease (being a personal right) and is prevented from enjoying the peaceful possession thereof? Indeed, according to section 8(2) of the Housing Act the Director of Social Housing may requisition a dwelling house from a tenant in possession thereof. And for the purposes of the said Act, “requisition” means taking possession of a building or requiring the building to be placed at the disposal of the requisitioning authority, and “requisitionee” means the person or persons from whose possession (without any qualification) a building has been requisitioned by the requisitioning authority.

The definition of possession at Maltese ordinary law is so worded that it impinges on this problem of interpretation and application in such a manner that possession held by personal title is left in a most uncertain position. Section 524 of the Civil Code lays down that:

“(1) Possession is the detention of a corporeal thing or the enjoyment of a right, *the ownership of which may be acquired* and which a person holds or exercises as his own.

(2) A person may possess by means of another who holds the thing or exercises the right in the name of such person.

(3) A person who has the detention or custody of a thing but in the name of another person, is called a holder”.

The nature of possession as outlined above affords certain ordinary rights to the possessor in case of molestation or in case of spoliation, but not always such fundamental rights to property and possession as enshrined in the Constitution and the European Convention.

But, then, what is one to make out of section 37 of the Constitution when it prohibits the compulsory acquisition of an interest in or right over property of any description? While, on the one hand, there should be no doubt that the interest which a prospective buyer of land might have on a promise of sale absolutely does not come within the parameters of section 37 (Alfred Balzan vs Prime Minister et, Constitutional Court, 15th January, 1991), though it might be of importance for the purposes of the Land Acquisition Ordinance where ‘owner’ is defined to include a person having *an interest* in the land (qualified as ‘*legal interest*’ in section 9(2) thereof), on the other hand, it does not result that the Maltese Courts (or the European Court for that matter) have ever directly dealt with the issue here raised, and it remains to be seen

whether the concept of possession and related interests will undergo further evolution.

It has already been noted that to a very large extent the Constitution protects both the Land Acquisition (Public Purposes) Ordinance and the Housing Act from any allegation that they violate section 37 of the Constitution, but that they receive no similar protection with regard to the provisions of the European Convention. Or do they in some manner or other?

### **Limitations Under The European Convention**

An interesting limitation to the right set forth in Article 1 of the First Protocol to the Convention lays out that no one shall be deprived of his possessions except in the *public interest* and subject to the *conditions provided for by law* and by the general principles of international law. Moreover, a state is in no way impaired the right to enforce such laws as *it deems necessary* to control the use of *property* in accordance with the *general interest* or to secure the payment of taxes or other contributions or penalties.

Thus, it would appear that if there is a deprivation of possession as authorised by national law and in the public interest, the exception contemplated by the Convention will become the rule and the relative fundamental right is left in abeyance.

Although there are marked differences in substance and in the procedure meant to achieve their scope and purposes, it cannot be denied that both the Land Acquisition Ordinance and the Housing Act have, by law, the conditions provided in the achievement of their respective purposes, and both aim for such purposes in the public interest. Indeed, the Land Acquisition Ordinance itself limits the said acquisition only to public purposes. But is a public purpose one and the same thing as the public interest? No such problem of interpretation arises in connection with the Housing Act as it only mentions the public interest which, on its part, is defined to mean making provisions for securing living accommodation to the homeless and for ensuring a fair distribution of living accommodation.

Section 3 of the Land Acquisition Ordinance provides that the President of Malta may by declaration signed by him *declare* any land to be required for a public purpose. Section 6 of the same Ordinance then lays down that no person shall require any proof of the said public purpose other than the declaration of the President of Malta.

### **Public Interest**

In spite of that, one would be justified to query whether any such declaration that land is required for a public purpose can be challenged in the local courts in the light of the relative provision of the European Convention,

made locally enforceable by Act XIV of 1987, which allows a signatory state a measure of appreciation in what may be deemed necessary to control the use of property in accordance with the general interest.

So far we have nothing much to go by except a partial judgement on this point by the First Hall of the Civil Court in its Constitutional jurisdiction in the case *Tracisio Borg et vs Commissioner of Land* (3rd May, 1991 as per Mr Justice Anton Depasquale) to the effect that, in spite of what section 6 of the Land Acquisition Ordinance and the proviso of Article 1 of the First Protocol to the European Convention actually entail, a declaration that land is required for a public purpose may be challenged on the basis of an allegation that land is not really required for a public purpose.

Seen in what should be its proper perspective, I feel that a declaration that land is required for a public purpose is simply a manifestation of Government intention with regard to that land, which should not be subject to judicial review by any court, but which should fail exclusively within the administrative and political domain of Government. This is what the margin of appreciation left to each signatory State should implicate. How the intention so manifested is realised in actual fact is a different matter and procedure should be completely subject to judicial review by the court in allowing an allegation that the use of the expropriated land did not justify the means adopted by Government in declaring that land to be required for a public purpose. Of course, there is no uniformity of thought and practice in determining what constitutes a public purpose.

## **Compensation**

In the Constitution it is an established precept inherent to the right to protection from deprivation of property that when such deprivation satisfies the legal requisites of section 37 that deprivation is subject to full and adequate payment of compensation representing the real value of the property expropriated according to the criteria laid down by the Land Acquisition Ordinance. Such precept is only indirectly referred to in the relative provision of the European Convention which relies on the general principles of international law. These principles, undoubtedly, entertain claims for compensation in much the same way as a similar claim would be entertained by the Maltese court.

The point to be queried, however, is whether the law requires that first compensation must be paid in order that the expropriating authority can consider itself to have legally taken possession of the expropriate land.

This was the argument put forward by applicants in the case *Anton Attard et vs Minister of Social Policy et* decided by the First Hall of the Civil Court (as per Mr Justice Franco Depasquale, 9th May, 1990), still pending on appeal to the Constitutional Court. The Court there dismissed the argument as unfounded at law for a number of reasons. No direct or indirect inference could

be made that either the Land Acquisition Ordinance itself or section 37 of the Constitution direct that compensation must first be paid for the expropriation to be valid at law. Furthermore, the *ration legis* of both laws cannot but lead to the same conclusion. If this were not so, the procedure for expropriating land required for a public purpose will become self-defeating and stultified when it was meant to be expedient and efficacious. Again one has to take into consideration the amendment to section 22 of Chapter 88, introduced by Act XI of 1989, to the effect that the expropriating authority is now obliged to deposit on account in the Court Registry such amount offered by it by way of compensation and without any prejudice to any balance eventually due to the person having an interest in the expropriated land by way of compensation after the title of such land will have been transferred to the competent authority by outright purchase. Practice shows that much time elapses in any case where the amount of compensation is either agreed upon or determined. *Necessitas publica major est quam privata*.

From what we have seen in this short article it appears that while in practice both the Maltese Courts and the European Court have been inundated with allegations of all sorts of violations of sections 37 and 38 of the Constitution as well as Article 1 of the First Protocol to the European Convention, the fundamental right to property being the next most important human right after the right to life and liberty, in theory a delineation of the right to the peaceful enjoyment of one's possessions poses more questions than it answers.

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